

EXHIBIT 2
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HB 359
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HEARING ON HB 359
HOUSE OF REPRESENTATIVES NATURAL RESOURCES COMMITTEE
FEBRUARY 11, 2013

Good afternoon and thank you for the opportunity to testify at the committee hearing on this bill, which at first blush seems simple and harmless. Not so. As I will explain, if passed, HB 359 would have serious consequences for Montana's private property owners whose land has been damaged as a result of toxic contamination through no fault of their own. First, my name is Roger Sullivan and I am an attorney with the Kalispell law firm of McGarvey, Heberling, Sullivan & McGarvey. For decades my firm has represented Montana landowners whose property has been damaged from a variety of sources, including toxic contamination.

The cornerstone to the protection of the private property rights of Montana citizens is the Montana Constitution, which specifies among our unalienable rights the twin guarantees to all Montanans of "enjoying and defending their lives and liberties," and "acquiring, possessing and protecting property." (Mont.Const.Art. II § 3.) Unfortunately, Montanans face the legacy of large out-of-state

corporations having operated their industrial complexes in Montana in ways that have not always respected the property rights of their neighbors, and which has resulted in toxic contamination of their land. To redress these wrongs, and consistent with the Montana Constitution, principles of equity, and common sense, the Montana Supreme Court has adopted a set of standards that “attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort [wrongful conduct].” *Sunburst School District No. 2, et al. v. Texaco, Inc., et al.*, 2007 MT 183, ¶ 32, 338 Mont. 259, 165 P.3d 1079, quoting *Restatement (Second) of Torts*, § 901, cmt. a (1997). In order to achieve this goal, the Montana Supreme Court has recognized that, “If a plaintiff wants to use the damaged property, instead of selling it, restoration of the property constitutes the only remedy that affords a plaintiff full compensation.” *Id.* at ¶ 34.

During recent legislative sessions, out-of-state corporations that are responsible for damaging private property owned by Montana citizens have attempted, through legislative proposals that have thus far been defeated, to create impediments to Montana citizens seeking to have their lands restored to its pre-contaminated condition. Similar efforts to cap the restoration damages available to Montana landowners have also been rejected by the Montana Supreme Court which has recognized that:

A strict cap on restoration damages would equip the tortfeasor with the equivalent of a private right of inverse condemnation, or a power

akin to a private right of eminent domain. Eminent domain is the right of the State to take private property for public use. Section 70-30-101, MCA. A potential tortfeasor would have an incentive to disregard or discount risks of contamination or pollution to neighboring property owners. . . . Injured property owners, by contrast, would face a “take it or leave it” proposition: sell the homes that they do not want to leave or continue to live under an increased threat of exposure to toxic chemicals. Injured property owners in Montana should not be forced into such a Hobson’s choice.

Sunburst, ¶¶ 46, 47 (emphasis added).

The unholy companion to the industrial polluters’ efforts to cap restoration damages has been their effort to introduce at trial evidence related to State and Federal agency proceedings over “remediation” at the industrial facilities. As explained in the *Sunburst* decision, there is a significant distinction between the less stringent “remediation” standards required by the Montana Department of Environmental Quality (DEQ) under Montana’s Comprehensive Environmental Cleanup and Responsibility Act (CECRA), MCA §§ 75-10-701, *et seq.*, than applies under the “restoration” remedy available to private citizens whose land has been contaminated by industrial polluters:

Thus, we agree with *Sunburst* that CECRA’s focus on cost effectiveness and limits on health-based standards differ from the factors to be considered in assessing damages under the common law. . . . We conclude that no conflict exists between DEQ’s supervisory role under CECRA and restoration damages awarded under the common law.

Sunburst, ¶ 59; see also *id.* at ¶¶ 22, 56.

Because of the fundamental distinction between the standards and limitations that apply to DEQ under CECRA and the different set of standards that apply to a private property owner damaged by an industrial polluter, the Montana Supreme Court ruled that it was proper for the trial court to exclude from trial any evidence of the industrial polluter's agreements, negotiations and consent decrees with DEQ, for the purpose of determining the compensatory damages that the private landowners were entitled to. *Sunburst*, ¶¶ 74-80. As the *Sunburst* Court explained:

Evidence of Texaco's after-the-fact negotiations with DEQ in the 1990s and the early 2000s to demonstrate its level of cooperation with state regulators after having caused the contamination would not change the scope of the damage or the cost of removing the contamination from the Sunburst property.

* * *

We agree with the District Court that DEQ's role in Texaco's belated attempts to comply with CECRA would not be relevant to Sunburst's claims to be made whole under the common law.
Sunburst, ¶¶ 78, 80.

In conclusion, the proposed legislation would overrule *Sunburst* and allow the admissibility of evidence that the Montana Supreme Court has determined has no relevance to the claims of Montana landowners to be made whole under the common law. This bill would thus violate the separation of powers as between our judiciary and our legislature, and substantially weaken the established common law rights of private Montana landowners to obtain nothing more than the cleanup of their contaminated property to the same condition that it was in prior to its

contamination. These common law standards implement and protect the Constitutional rights of all Montanans to enjoy, possess and protect their property.

We request that you not diminish the rights of Montanans to the enjoyment and exercise of these fundamental rights. Please join us in opposing HB 359.

Thank you.

A handwritten signature in black ink, appearing to read "Roger Sullivan", with a stylized, cursive script.

Roger Sullivan